***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 74-1468

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# United States Court of Appeals

**For the Second Circuit**

**Docket No. 74-1468**

**(T-3378)**

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

*Plaintiff,*

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

*Defendants.*

and Consolidated Cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF PLAINTIFFS-APPELLANTS "BRANDENBURG"



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## TABLE OF CONTENTS

PAGE

CITATIONS

*Cases*

STATUTE



OTHER AUTHORITIES

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### The Issues Presented for Review

1. Is it an abuse of discretion for the Magistrate and Trial Court to remit plaintiffs to another forum where such forum provides plaintiffs no remedy?

2. Do the English Courts to which plaintiffs have been remitted, provide plaintiffs any remedy?

## Statement of the Case

This is an appeal by Hapag-Lloyd A.G. as owner of the M/V Brandenburg in action 73 Civ. 166, and Stork Amsterdam N.V. Industrias Lacteas Dominicanas, S.A. "Indulac" et al., as owners of part of Brandenburg's cargo in action 73 Civ. 182 (all of the aforesaid parties hereinafter being referred to as "Brandenburg plaintiffs") from final order of the United States District Court for the Southern District of New York, Honorable Charles M. Metzner, dated March 26, 1974 (A. 379a), which simply adopted *in toto* the opinion and suggestion in the final report of Magistrate Martin D. Jacobs submitted January 23, 1974 (A. 360a) that all complaints in these consolidated actions should be dismissed on the basis of *forum non conveniens*, on condition that (1) defendants submit to the jurisdiction of the English Courts; and (2) waive any Statute of Limitations defenses as to any claim against them.

Separate brief is being filed on behalf of the appealing death claimants in these Consolidated actions.

## Statement of the Facts

These fourteen consolidated suits are brought to recover for the total loss of the Brandenburg, heavy loss of life of her crew, and total loss of her cargo when she struck the unlocated, unmarked sunken wreck of Texaco Caribbean in the Dover Straits at 0730 A.M., January 12, 1971, and sank within minutes afterwards.

For purposes of this appeal and for purposes of disposition of the *forum non conveniens* motion, plaintiffs' legal arguments should be judged in context of the facts for which plaintiffs contend. So far as needed on appeal, these are the following:

1. Defendants' vessel Texaco Caribbean at about 0400 on January 11, 1971, was in collision on the high seas in the Dover Straits with the M/V Paracas. (A. 267a)

2. The forward section of Texaco Caribbean sank promptly. The stern section remained afloat until about 2:08 P.M. in the afternoon of January 12th. (A. 268a)

3. During the time Texaco Caribbean's stern section remained afloat, the United States flag freighter Leslie Lykes stood by it for several hours. Crew Members of Leslie Lykes observed that a samson post of Texaco Caribbean was close enough to the water to permit attachment of a life preserver or other floating marker, so that the slowly sinking stern section would have been marked after it submerged. (A. 268a)

4. In the morning of January 11, 1971—*before* Texaco Caribbean's stern section sank—the firm of Smit-Tak/Rotterdam, a well-known salvage company, offered the services of their well-equipped wreck search and salvage vessel Orca to TOT[1] London. The offer was not accepted; Smit-Tak understood from Texaco the reason was that it could not be accepted without authority from Texaco/New York. (A.269a)

5. At about 2:08 P.M.—ten hours after the Paracas/Texaco Caribbean collision—the stern section of Texaco Caribbean sank—unmarked—below the surface. (A. 272a)

6. After the sinking of the stern section of the Texaco Caribbean, Smit-Tak renewed its inquiries of the Texaco Caribbean interests. Smit again received no instructions, evidently because Texaco/New York had not given the necessary instructions. (A. 272a)

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1. Texaco Overseas Tankships Limited.

7. The ship Siren, which had been dispatched by Trinity House (roughly the equivalent of our Coast Guard) to the collision area, finally arrived at about 4:30 P.M. January 11, 1971—twelve hours after the Paracas/Texaco Caribbean collision. The stern section of Texaco Caribbean had by then already sunk. Those on Siren had no real idea of where the sinkings had occurred. Darkness set in before Siren could make any effective sweeps searching for the wreck. (A. 272a)

8. After abandoning her efforts to locate the sunken Texaco Caribbean, the Siren, showing three vertical green lights, anchored at the westerly edge of an oil slick visible in the area. Her anchored position, as shown by the later determined location of the actual wreck area, was *about a mile* from the actual location of the sunken Texaco Caribbean. (A. 272a)

9. At about 0730 A.M. January 12, 1971, Brandenburg ran upon the stern section of Texaco Caribbean, sank almost instantly, and became a total loss with all of her cargo and with loss of life of many of her crew. (A. 272a)

10. After the sinking of the Brandenburg, her owner immediately employed Smit-Tak. Smit's vessel Orca, equipped with very modern wreck searching equipment, was dispatched to locate the sunken wrecks. *She located them precisely, by sonar, within half an hour of her arrival at the scene.* Her personnel say that, if requested by Texaco after Texaco Caribbean's collision with Paracas, Orca could have reached the collision area in plenty of time *to locate and mark* the wrecks, before Brandenburg reached the area. In the event, Texaco Caribbean's sunken remains were not located and marked until the Orca arrived—after the Brandenburg sinking. (A. 274a)

11. Both the Texaco Caribbean/Paracas collision, and Brandenburg's collision with the Texaco Caribbean's sunken remains, occurred on the high seas, outside English territorial waters and "outside the jurisdiction of the English Courts". (A 275a)

## ARGUMENT

## POINT I

**An Essential Requirement for Application of Forum Non Conveniens is the Existence of an Alternative Forum Providing Plaintiff With an Effective Remedy.**

It seems self evident that for the doctrine of *forum non conveniens* to be applied without injustice there must be two available effective forums. The leading case of *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 506/7 (1946) states:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amendable to process; the doctrine furnishes criteria for choice between them."

The same principle applies with respect to the substantive cause of action. Of what use is it to plaintiff to provide him with an alternative forum in which he is able to obtain service of process on the defendant so as to obtain jurisdiction *in personam*, if the Courts of that alternative forum provide plaintiff with no remedy?

*Gulf* itself states that an effective alternative forum preserving plaintiff's remedy is a condition precedent to application of *forum non conveniens:*

> "*** plaintiff may not, by choice of an inconvenient forum, 'vex, harass, or oppress' the defend-

> ant by inflicting upon him expense or trouble *not necessary to his own right to pursue his remedy*". (emphasis added) 330 U.S. 501, 508.

The Supreme Court thus makes clear that, *even if* a defendant has a strong balance on issues of convenience and expense, plaintiff is nevertheless entitled to its chosen forum *when that forum is necessary to plaintiff's remedy.*

It is noteworthy that Magistrate Jacobs, in his opinion as adopted by the Court *in toto* below, totally ignores this crucial aspect of *Gulf*. His opinion has an extended discussion of the *convenience* tests of Gulf (A. 364a) but stops inexplicably just short of the language quoted above and omits all reference to the crucial condition precedent set forth in that language—the necessity of an alternative effective remedy in the suggested alternate forum.

The reason for the Supreme Court requirement of an effective alternate forum is clear—the doctrine is not to be employed as a device to extinguish a plaintiff's properly served complaint without a trial on the merits. As stated in *Tivoli Realty* v. *Paramount Pictures*, 89 F.Supp. 278 (1950), *mand. denied* 186 F.2d 111, *cert. den.* 340 U.S. 953, *appeal dismissed* 186 F.2d 120:

> "One obvious reason for this requirement was that the plaintiff was entitled to know that if his action were dismissed by reason of the application of the doctrine, he could still *effectively bring suit* against the defendant in the more convenient forum." 89 F.Supp. 278, 281. (emphasis added).

Absence of any remedy whatsoever in the purportedly more convenient forum is equivalent to the absence of jurisdiction over the defendant in that forum. Dismissal of a plaintiff's suit by the United States Court in either case operates as an unjust and conclusive extinction of plaintiffs'

claim without a trial on the merits. Under *Gulf*, plaintiffs *may* inflict that expense or trouble which *is* necessary to pursue their remedy. Where only one forum offers a remedy, plaintiffs are entitled to a trial on the merits in that forum.

This principle is explicitly stated and followed in *Chemical Carriers* v. *L. Smit & Co.'s Internationale*, 154 F.Supp. 886 (S.D.N.Y. 1957), an action by a Liberian corporation against a Netherlands corporation The defendant had contracted to tow a vessel owned by the plaintiff from Philadelphia to Rotterdam. En route, the tugs of the defendant anchored the plaintiff's vessel, and proceeded to salvage a third vessel which had broken down in mid-Atlantic.

The contract between the parties had provided that the agreement would be subject to Netherlands law. Despite this, the Court refused to decline jurisdiction, since it was shown that the remedy available to plaintiff in the United States would not be available in the proposed alternate forum:

> "In view of what appears to be the Netherlands law, the practical result of compelling libellant to litigate in the Rotterdam courts might well be to deprive it of all remedy. Such a result would not be in accord with the theory of salvage in this country *** and would work an unreasonable hardship upon the libellant." 154 F.Supp. 886, 889.

(quoted with approval in *Gen. Motors Overseas Oper.* v. *S.S. Goettingen*, 225 F.Supp. 902, 906/907 (S.D.N.Y. 1964).

The Court distinguished other cases which had declined jurisdiction in favor of a foreign forum, on the basis that "there was no showing in either of those cases that the libel-

lant would be without effective remedy in the foreign forum", and retained jurisdiction, in spite of the specific agreement to the foreign jurisdiction and law.

In the present case, where there is no agreement to foreign law or jurisdiction, the principle should be applied *a fortiori* to retain jurisdiction rather than sending Brandenburg plaintiffs to the English jurisdiction which fails to provide them with the remedy offered by the United States Court.

Similarly, in *Heredia* v. *Davies*, 7 F.2d 741, 742 (E.D. Va. 1925), *affirmed* 12 F.2d 500, 501 (4th Cir., 1926), the Court overruled a motion to decline jurisdiction of a suit by a Peruvian seaman for a personal injury aboard a Peruvian flag steamship on the basis that:

> "A remedy is given by American law, but which is without remedy under the Peruvian law".

The ruling was affirmed by the Court of Appeals "to prevent a failure of justice".

The *Heredia* case was cited with approval in *Gkiafis* v. *S.S. Yiosonas*, 387 F. 2d 460, 464 (4th Cir. 1967), which overruled as an abuse of discretion dismissal of a seaman's complaint, on the ground that the seaman's remedy in Greece was at best uncertain and retention of jurisdiction was therefore necessary "to prevent a failure of justice".

The key test of whether jurisdiction should be retained is, it must be noted, not "convenience" but "justice".

Jurisdiction of suits between foreigners of different nations for causes of action arising on the high seas is to be retained "unless special circumstances exist *to show that justice would be better subserved by declining it.*" (emphasis added). *The Belgenland*, 114 U.S. 355, 367 (1885), quoted with approval by the Court of Appeals for the Fifth

Circuit in *Motor Distributors, Ltd., et al.*, v. *Olaf Pedersen's Rederi A/S*, 239 F.2d 463, 465 (5th Cir. 1957), *cert. denied* 353 U.S. 938 (1957). In the *Motor Distributors* case the Circuit Court of Appeals reversed as an abuse of discretion the Trial Court's refusal to retain jurisdiction.

The Courts have refused to decline jurisdiction in a variety of situations which would have the effect of preventing plaintiff from obtaining an effective remedy on the merits in the alternate forum suggested by defendants.

In *Royal Mail Steam Packet Co.* v. *Compania De Navegacao Lloyd Brasileria*, 27 F.2d 1002, 1003 (E.D.N.Y. 1928) the Judge refused to decline jurisdiction of a suit for collision between a British and a Brazilian ship in Belgian waters. The Court felt that "the suit should be tried here to do justice."

The Court found that if the plaintiff were forced to try the suit in Belgium "the rights of the libellant will be greatly impaired and from that standpoint an injustice done to libellant if it is compelled to accept the forum now sought to be chosen by respondent, as against libellant's choice of this forum". (27 F. 2d at page 1003)

The injustice the Court found was that the Belgian law of limitation of liability would limit defendant's liability to 200 Belgian francs per gross ton; and the Belgian currency had devalued following the World War to such a point as virtually to destroy plaintiff's remedy. The Court said that if defendant were allowed to limit in Belgium, it would be "enabled to unjustly avoid a large portion of its liability" so that plaintiff's remedy would be "so inadequate as to be unjust and unfair". (27 F. 2d at page 1004)

For this reason jurisdiction was retained.

In *Varvvovsos* v. *Pezas*, 41 F.Supp. 318, 319 (S.D.N.Y. 1941), the Court refused to decline jurisdiction of a suit by

Greek seamen against the Greek shipowner in favor of the Greek Courts where there were "special circumstances which will leave him (the seaman) without adequate remedy".

The special circumstances were that Greece was occupied by the Germans at that time during World War II, the Court finding that if sent to the alternate forum "these libellants would be left without an adequate remedy". (41 F. Supp. at page 319).

In *S.N. Browning de Cuba* v. *MV. La Havana*, 181 F. Supp. 301 (Md. 1960), the Court denied a motion to send to Cuba a case between Cuban corporations, concerning a contract made in Cuba regarding ships in the Cuban Merchant Marine. The ground for the United States Federal Court in keeping jurisdiction was that in view of the situation then existing in Cuba "it is very doubtful whether libellant can hope to receive justice in Cuba. *That is the dominant factor to be considered in every case when such doubt exists.*" (emphasis added). (181 F. Supp. at page 311).

Thus where existence of a remedy for plaintiff in the alternate forum suggested by defendant is in serious doubt, whether because of war conditions, political conditions, disastrous currency devaluation, or—*a fortiori*—absence of a cause of action under the law of the alternate forum, our Federal Courts will retain jurisdiction to prevent a failure of justice.

Factors of mere "convenience" must be overridden where the suggested alternate forum provides no effective remedy for plaintiff. As stated by Professor Alexander M. Bickel, "*Forum Non Conveniens in Admiralty*"[2], it "* * *

2. 35 Cornell Law Quarterly 12, at 28 (1949).

follows from the existence of jurisdiction in the first place, that a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true * * * The question of whether the law of the other forum permits recovery for the wrong libellant alleges is highly pertinent, and a finding that it doesn't, *should result in an automatic assumption of jurisdiction.*"[3] (Citing *Heredia* v. *Davis, supra,* page 8). (emphasis added).

## POINT II

**If forced to sue in England Brandenburg Plaintiffs would be Deprived of the Remedy which is available in the United States Courts.**

This accident, as the Magistrate's opinion concedes (A. 377a), was on the high seas. The law applied to a collision ". . . on the high seas, not within the jurisdiction of any nation . . ." is ". . . the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted," *The Belgenland,* 114 U.S. 355, 369 (1885).

The basis of the present suits is to impose liability on Texaco Caribbean's owners for total loss of the Brandenburg and her cargo and heavy loss of life of her crew when she struck the unlocated, unmarked sunken wreck of Texaco Caribbean. The owner of a vessel lost under such conditions has a duty under the General Maritime Law[4] to

3. *Ibid.,* Footnote 68.

4. Not confined to the Wreck Act of the United States as might be implied from the Magistrate's opinion (A. 370a). An owner's non-delegable duty to make all reasonable efforts to mark exists no matter whether his hazardous wreck lies in U.S. territorial waters [and is thus covered by The Wreck Statute, 33 U.S.C. § 409

*(Footnote continued on next page)*

locate and mark the sunken wreck of a vessel lost by a casualty, so as to avoid harm to others. There is, however, a crucial difference between the General Maritime Law as applied by the English Courts, and as applied by the United States Courts.

In the United States Courts Brandenburg plaintiffs if they prove the facts they allege can recover for the damages caused by Texaco's negligent failure to locate the wreck of Texaco Caribbean; in England they cannot.

Texaco within a few hours of the collision of Texaco Caribbean with Paracas notified Trinity House (roughly the equivalent of the United States Coast Guard). Trinity House agreed to act, and dispatched Siren to locate and mark the wreck.

In England this relieves Texaco of further liability, even though Siren had not located the wreck before Brandenburg struck it.

In the United States, it does not.

**A. In England Brandenburg plaintiffs have no remedy against Texaco.**

The General Maritime Law as applied by the English Courts denies any remedy to Brandenburg plaintiffs.

The English House of Lords (*The Utopia* [1893] A.C. 492) and the Court of Appeal (*The Douglas* [1882] 7 P.D.

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*(Footnote continued from previous page)*

(1920)], or in international waters (covered by the general maritime law).

The Wreck Statute is ". . . but declaratory of the general maritime law * * * and without any statute the law lays this obligation upon every owner who does not abandon a wrecked vessel". *The William Nelson*, 296 F. 553, 556 (E.D.N.Y. 1923).

"But without any statute the law lays this obligation [to buoy a wreck in navigable waters] upon every owner who does not abandon a wrecked vessel." *The Plymouth*, 225 F. 483 (2 Cir., 1915).

151) have established in England an inflexable rule which would relieve Texaco from liability for its faults and failures, merely on the basis of Texaco's invitation to governmental authority to take action to locate and mark, even though that action was wholly ineffective.[5] These high English legal authorities indicate that under the Rule in England when a governmental authority agrees to act in connection with marking the wreck, the shipowner has no further obligation to do so. Since, therefore, Trinity House (the official Lighthouse authority in England) had been informed of the collision and explosion of Texaco Caribbean, and was making efforts, however limited and unsuccessful, with its ship "Siren" to locate and mark the wreck of Texaco Caribbean, the result under the authority of the House of Lords and the Court of Appeal in England is that Brandenburg and her cargo, if forced to sue in England, would be deprived of all remedy against Texaco.

On the other hand,

**B. The United States offers opportunity to Brandenburg plaintiffs to recover its enormous losses resulting from Texaco faults.**

In sharp contrast to the English maritime cases, a number of recent admiralty decisions by this Court squarely hold that merely notifying governmental authority does *not* release the shipowner of his continuing non-delegable duty to find and mark the wreck. *The Berwind-White Coal Mining Co.* v. *Pitney Eureka No. 1107*, 187 F. 2d 665, (2nd Cir. 1951); *Morania Barge No. 140, Inc.* v. *M. & J. Tracy Inc.*, 312 F. 2d 78, (2nd Cir. 1962).

In *Berwind-White* this Court stated the principle emphatically and clearly, and expressly disapproved earlier cases which had followed the English rule:

5. For detailed analysis of these cases, see pp. 15 to 18 *infra*.

"Nor do the unsuccessful efforts of the Coast Guard to locate and mark the wreck affect this liability. It has long been the law that an owner may comply with the statutory requirement for marking by getting the Lighthouse Department (Now the Coast Guard) to do it; when the Coast Guard does mark the wreck, whether properly or not, the owner is relieved of any statutory duty in that respect. The Plymouth, 2 Cir. 225 F. 483, certiorari denied, 241 U.S. 675, 36 S. Ct. 725, 60 L.Ed. 1232; New York Maritime Co. v. Mulligan, 2 Cir., 31 F.2d 532; City of Taunton-Sunken Wreck, D.C.S.D.N.Y., 11 F. 2d 285, 1927 A.M.C. 135; The Barge Chambers, D.C.S.D.N.Y., 98 F. 194, 1924 A.M.C. 572; Wilson v. Mitsui & Co., D.C.N.D.Cal. 27 F.2d 185. The basis of this exception to the otherwise nondelegable duty is the fact that the private owner cannot interfere with the manner in which the government agency uses its discretion in the manner of marking. The Plymouth, supra. Although the Coast Guard's search for the wreck may, if made with due diligence in the light of the facts within the knowledge of the owner, operate to discharge the owner's duty, *the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all r- sonable efforts to mark.* The Snug Harbor, 4 Cir. ,0 F. 2d 27. The dicta in Petition of Anthony O'Boyle, Inc., 2 Cir. 161 F.2d 966, 967, and Red Star Towing & Transportation Co. v. Woodburn, 2 Cir., 18 F. 2d 77, 79, which may indicate the contrary should be discounted accordingly." (Emphasis added). (187 F.2d at page 669).

The U.S. rule expresses a straight-forward and important policy: the owners of a hazardous wreck are not

permitted to dump all responsibility for locating it upon government authorities, but must themselves take all reasonable measures to see that *effective* steps are taken to locate it. This case demonstrates the rule's wisdom. Texaco defendants' advice to Trinity House of the loss resulted in no effective action to locate their wreck (the Siren was unable to find it); and Texaco defendants did not feel obliged to incur the cost of retaining Smit's services, which *would* have resulted in the wreck's location and marking, or even to take the simple step of arranging that a marker be attached to the stern section of Texaco Caribbean while still afloat.

For this failure the United States Courts give Brandenburg plaintiffs a remedy; the English Courts do not.

**C. The Magistrate below[6] erred as a matter of law in failing to give the proper weight to the fact that the English courts do not provide Brandenburg plaintiffs with an effective remedy.**

The Magistrate below totally failed to appreciate either the nature or the importance of the legal precedents which clearly show that Brandenburg plaintiffs do not have an effective alternative forum in the English Courts.

(1) The Magistrate totally misread the House of Lords' authority; (2) The Magistrate simply ignored the leading Court of Appeal authority; (3) The Magistrate assumed the facts contended for by *defendant*, when passing of the question of whether *plaintiffs'* theory was viable.

(1) The Magistrate's discussion of *The Utopia*, House of Lords, [1893] A.C. 492 misses the central point of that case. The Magistrate at page 10 (A. 369a) correctly points out that the Court exonerated the owner of the vessel for liability for faulty marking by the Port Authorities. As

6. Approved without opinion by the Court.

pointed out by the Magistrate, the House of Lords stated that in order to hold the owner liable "two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them * * * and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect". ([1893] A.C. at page 498).

The Magistrate misinterprets this language as follows:

> "While the case recognizes that there is no liability on the owner for the default as such of the governmental authority, it also recognizes that the owner is liable where there has been 'misconduct or neglect' on its part, apart from the conduct of the authority." It should be noted that in the present situation plaintiffs do charge a failure on the part of defendants themselves to call upon Smit to locate and mark the wreck". (A. 370a)

That this comment misses the central thrust of the House of Lords' decision is shown by the preceding paragraph by the Magistrate:

> "The Court recognize that while *The Utopia* was not abandoned 'in the sense that they gave up all rights of property and possession' 'control and management of the wreck, so far as related to the protection of other vessels from her, and her from them, was properly transferred to the Port Authority' and no default or negligence could be impleaded to *The Utopia* '*in allowing the Port Authority to take on itself the control* of the lighting or in abstaining from interfering with the subsequent action of the Port Authority in the matter." (A. 369a)

In other words the House of Lords held that in notifying the Port Authorities the owner had transferred control of

the vessel so far as the duty to mark her, and was not liable for any future failures to do so or to do so properly. That is the very point which we make in this case. The failure on the part of Texaco to mark the floating stern section of Texaco Caribbean, or to call upon Smit to locate and mark the wreck would under English law not result in liability of Texaco, whereas it would so result under United States law.

(2) The Magistrate totally ignored the other leading case of *The Douglas*, Court of Appeals [1882] 7 P. D. 151.

Although this case is cited at page 10 of the Magistrate's opinion, (A. 369a) it is not discussed. *The Douglas* demonstrates even more clearly than *The Utopia* that Brandenburg plaintiffs would not have in England the remedy available to them in this Court.

In *The Douglas*, the Douglas sank in Gravesend Reach at approximately 6 P.M., October 26. The crew of the Douglas abandoned ship and were carried by a passing boat to Gravesend, where the Douglas' mate instructed a tug captain to notify the harbor-master of the casualty, and to request him to take care of the wreck. A message was returned to the Douglas' mate that the harbor-master would undertake to light the wreck. Approximately six hours later, before the wreck was lit, The Mary Nixon struck the wreck of the Douglas and sank. Despite the Douglas' owners' unbroken claim of possession of the wreck, 7 P.D. at p. 160, they were nonetheless exonerated from liability to The Mary Nixon, *simply on the basis of their having given* "*. . . the harbor-master notice to perform the duty* [*of locating and marking the wreck*]", 7 P.D. at p. 161. The Magistrate's Report fails to deal with this authority—which is completely contrary to the U.S. admiralty authorities—in any way.

The Magistrate's Report thus does not even discuss the leading English authority of *The Douglas*, which estab-

lishes that *mere notice* to governmental authorities relieves the owner of a wreck from further liability under English law. (". . . the collision was reported to the harbor-master, and . . . the [Douglas'] mate did receive a communication from the harbor-master. This circumstance exonerates the defendants from the charge of negligence, *for it gave the harbor-master notice to perform the duty.*" 7 P.D. at p. 161 (emphasis added).

(3) The Magistrate erroneously assumed the facts posited by defendants in passing upon the validity of plaintiffs' legal theory.

The Magistrate gives lip service to plaintiff's theory when he states on page 11 (A. 370a) "on the other hand, plaintiffs urge that under United States law there is a non-delegable duty on the part of the owner and that the owner is not necessarily relieved by turning over the matter to a governmental authority." He also quotes at page 12 (A. 371a) from the language of this Court in *Berwind-White:*

> "Although the Coast Guard's search for the wreck may, if made with due diligence in the light of the facts within the knowledge of the owner, operate to discharge the owner's duty, the mere fact that the Coast Guard undertakes a search does not relieve the owner of liability for failure to make all reasonable efforts to mark."

Having, however, thus set forth plaintiff's theory of liability, the Magistrate proceeds to ignore it on the basis of his assertion that *if Texaco defendants' version of the facts be accepted,* it might prove that there was no difference in the result under English or under United States law. He refers to Texaco defendants' assertion that "the vessel Siren moored at immediate vicinity and displayed a

warning". He then states "*accepting the factual version of the defendants*, it may be argued that there was a 'marking' by the Siren and that under the claimed facts there would be no difference between the English law and the United States law". (Emphasis added) The Magistrate's error is made even clearer by the following sentence: "Thus, it is not clear that under plaintiff's theory of liability or *defendants' version of the sinking* of the Brandenburg there is a difference between English law and the United States law". (Emphasis added).

It is error as a matter of law for the Magistrate and the Court below to accept the factual version of Texaco defendants as a basis for judging Brandenburg plaintiffs' assertion that there is a vital difference between English and American law. This amounts merely to saying that on some possible version of the facts to be found by the Court at a future trial, Brandenburg plaintiffs might fail to recover even in the United States Courts and under United States law. Brandenburg plaintiffs' point, however, is that in the English Courts, even if the facts are found in accordance with the contentions of Brandenburg plaintiffs rather than those of Texaco, Brandenburg plaintiffs will have no remedy, although they have a remedy here. The Magistrate (and the Court below, by adopting his opinion) abused judicial discretion in failing to accept, for purposes of the dismissal motion, plaintiffs' facts—that the wrecked stern section of the M/V Texaco Caribbean upon which Brandenburg ran and was lost was not only *not* buoyed at the time of Brandenburg's loss, but had not even been found by the Siren or by anybody else. Comparison of the location of the sunken Texaco Caribbean's stern section with the anchored position of the Siren at the time the Brandenburg ran upon the wreck shows the Siren to have been located well over a mile from the wreck. (This is uncontradicted,

except by Texaco's unsupported adjective "immediate vicinity"). The Magistrate's report erroneously adopted the use of defendant's unsupported adjective "immediate vicinity" and conclusory language of a possible partial "marking", and therefore failed to appreciate that on the facts submitted by plaintiffs, plaintiffs would have no remedy under English law (because of mere notice to Trinity House by Texaco defendants) while they do have a remedy under U.S. law (owing to Texaco defendant's non-delegable duty to locate their wreck despite the giving of notice to governmental authorities).

In thus judging plaintiffs' legal theory on the basis of Texaco defendants' general allegation that the Siren was located in the "immediate vicinity" of the wreck, and in disregard of plaintiffs' specific contrary assertions, the report erroneously fails to heed this Circuit's repeated "... admonition that 'a judge should not resolve a factual dispute on affidavits ..., for then he is merely showing a preference for 'one piece of paper to another' (*Sims* v. *Green*, 161 F.2d 87, 88 3rd Cir., 1947, *Dopp.* v. *Franklin National Bank*, 461 F.2d 873, 879 2nd Cir., 1972)". New York Law Journal of January 18, 1974, page 1, 5, column 3 (2nd Cir., 1973).

On this motion, where Texaco defendants are movants, plaintiffs should be entitled to receive the benefit of any doubt on contested factual points relevant to the dismissal motion. If that is done, then it is to be assumed—as in fact it actually occurred—that the Siren was stationed over a mile from Texaco Caribbean's wreck, and that the wreck had not been located, at the time of the loss of the Brandenburg. On those assumptions, which plaintiff Brandenburg expects to establish at the trial, there is a clear and completely prejudicial difference between United States law and English law. In England, as established by *The Douglas*, Court of Appeal [1882] 7 P.D. 151, *supra*, mere

notice to the Trinity House governmental authorities would relieve Texaco from liability. In the United States, under the *Berwind-White* case quoted by the Magistrate, 187 F.2d 665, 669 (2nd Cir., 1951); (A. 370a-372a), Texaco could be held liable for its own negligent failure to locate the wreck.

It follows that to remit Brandenburg plaintiffs to the English forum is to deprive them of all remedy. This is not merely "claimed less favorable English law" as the Magistrate's report put it at page 14. (A. 373a). It is rather a complete absence of the essential prerequisite to a transfer for *forum non conveniens*—an available effective alternative forum.

The Magistrate's final basis for refusing to give weight to the crushingly adverse English decisions also fails to stand analysis:

> "Whether the principle urged by plaintiffs—that jurisdiction should be retained in view of the claimed less favorable English law[7]—should be applied in the present situation where all of the claimants are foreign residents or nationals presents a doubtful question." (A. 373a)

As stated by the United States Supreme Court in *The Belgenland*, 114 U.S. 355 (1885), and quoted with approval by the Court of Appeals for the Fifth Circuit in *Motor Distributors, Ltd., et al.*, v. *Olaf Pedersen's Rederi A/S*, 239 F.2d 463 (5th Cir. 1957), *cert. denied* 353 U.S. 938 (1957), a case of a collision of a German vessel on the high seas with a Norwegian vessel in the Dover Straits:

> "*** where the parties are not only foreigners, but belong to different nations, and the injury or

7. i.e., no remedy in England.

> salvage service takes place on the high seas, *there seems to be no good reason why the party injured or doing the service should ever be denied justice in our courts.* Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris* and can generally be more impartially and satisfactorily adjudicated by *the court of a third nation having jurisdiction of the res or parties than it could by the courts of either of the nations to which the litigants belong.*" (emphasis added) 114 U.S. 355, 368.

The Magistrate, (and the Court below in adopting his recommendation) it is submitted erred as a matter of law in failing to appreciate or apply the applicable legal standards, with the result that Brandenburg plaintiffs have been remitted to an alternate forum which provides them with no remedy.

## CONCLUSION

The Magistrate, and the Court below in adopting his Recommendation, erred as a matter of law, and committed clear abuses of discretion, in

(1). Failing to recognize that an essential requirement for application of *forum non conveniens* is the existence of an alternate forum providing plaintiff with an effective remedy; and

(2). Failing to recognize that there is a vital difference between United States and English law, in that English law gives Brandenburg plaintiffs no remedy; and

(3). Accepting Texaco defendants' allegations of fact on disputed issues, and failing to accept for purposes of this motion Brandenburg plaintiffs' allegations of fact, even when undisputed.

The Magistrate's requirements of appearance and waiver of time bar are a mockery since there is no remedy in England.

If Brandenburg's allegations of fact be accepted—as they must be on this motion—sending plaintiffs to England would be to deprive them of the remedy available here.

In these circumstances justice and the law require that jurisdiction be kept here.

The decision of the Magistrate, approved by the Court below, should be reversed as a matter of law, with instructions that the case be retained for trial on the merits.

Respectfully submitted,

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